84-1694 (1)

NO. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SHARYLAND WATER SUPPLY CORP.

Petitioner

versus

JOHN R. BLOCK and J. LYNN FUTCH,

Respondents

On Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

EWERS, TOOTHAKER, EWERS, ABBOTT, TALBOT, HAMILTON & JARVIS
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ATTORNEYS FOR PETITIONER

40pp

QUESTION PRESENTED FOR REVIEW

Whether financial data submitted by a borrower to a government lending agency is privileged within the meaning of 5 U.S.C. §552(b)(4).

CERTIFICATE OF INTERESTED PERSONS

The undersigned, Counsel of Record for Appellant, SHARYLAND WATER SUPPLY CORP. certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Sharyland Water Supply Corp.
   Appellant

2. John R. Block, Individually and as Secretary of the U. S. Department of Agriculture
   Appellee

3. J. Lynn Futch, Individually and as State Director of the Farmers' Home Administration
   Appellee

4. Dieter and Heide Marie Nippert
   Intervenors

Neil Norquest ourmas.

NEIL NORQUEST

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

SHARYLAND WATER SUPPLY CORP.
Petitioner

versus

JOHN R. BLOCK and J. LYNN FUTCH,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, SHARYLAND WATER SUPPLY CORP., respectfully prays that a Writ of Certiorari issue to review the judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 18, 1985.

OPINION BELOW

The Opinion of the Court of Appeals for which a Writ is sought is attached hereto as Appendix "A".

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 18, 1985. A timely Petition for Rehearing was denied on April 24, 1985, and this Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

5 U.S.C. §552(b)(4) provides that:

> "This section does not apply to matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential."

S. Rep. No. 813, 89th Cong., 1st Sess. 1965 provides that:

> "This [fourth] exemption is necessary to protect the confidentiality of information which is obtained by the government through questionaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. Specifically it would include any . . . financial data submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan."

H. R. Rep. No. 1497, 89th Congress, 2d Sess. 1966, reprinted in 1966 U.S. Code Cong. & Ad. News 2427, provides

that:

> "This exemption would . . . include . . . financial data submitted by an applicant to a government lending or loan guarantee agency."

18 U.S.C. § 1905 provides that:

> "Whoever, being an officer or employee of the United States or of any department or agency thereof . . discloses . . . any information, coming to him in the course of his employment or official duties or by reason of any . . . report or record made to filed with such department or agency or officer or employee either of which information concerns or relates to the . . . amount or source of any income, profits, losses, or expenditures of any . . . corporation . . . shall be fined not more than one thousand dollars or imprisoned not more than one year, or both; and shall be removed from office and employment."

STATEMENT OF THE CASE

Petitioner desires to enjoin the Farmers Home Administration (FmHA) from disclosing detailed financial information contained in five annual audit reports which were submitted by the Petitioner to the FmHA during the years 1979-1983.

The Petitioner is a non-profit rural water supply corporation which is certified by the State of Texas to provide

treated water to the residents of a designated area in Hidalgo County, Texas.

During the years 1979-1983, Petitioner borrowed sums of money from the Farmers Home Administration for the expansion of its plant and delivery systems. Each time the Petitioner applied for a loan from the FmHA it was required to sign and submit to the FmHA a document entitled "Association Loan Resolution Security Agreement". Paragraph 5(e) of each such agreement required the Petitioner to establish and maintain books and records relating to the operation of its system and its financial affairs, and to provide to the FmHA an annual audit thereof. Pursuant to such agreements, the Petitioner has, since 1979, provided the FmHA with audit reports containing, among other things, income and expenditure data and salary information on key personnel.

The audit reports which the Petitioner annually submits to the FmHA are being sought by Intervenors in connection with civil litigation which is now pending between them and the Petitioner in state district court. Because the state court has denied Intervenor's discovery requests for such information in accordance with the appropriate Texas discovery and evidence rules, the records are now being sought from the FmHA. The state district court order denying Intervenors' discovery request is attached hereto as Appendix "B". The FmHA's Texas State Director has responded to the Intervenors' request by instructing the FmHA District Director in Rio Grande City, Texas, to disclose and furnish the reports to them. The letter from the District Director to the Intervenors' attorney responding favorably to the request is attached hereto as Appendix "C".

On May 8, 1984, Petitioner sued the United States Secretary of Agriculture and FmHA state director under the

Administrative Procedures Act 5 U.S.C. §701 et seq., to enjoin them from releasing the reports on grounds, among others, that a disclosure would constitute an abuse of agency discretion or not be in accordance with law within the meaning of 5 U.S.C. §706(2)(A), as same would be violative of the Trade Secrets Act, 18 U.S.C. §1905 if the information was exempt from mandatory disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. §552(b)(4).

The trial court originally entered an order restraining disclosure, but subsequently declined to enter a temporary injunction pending trial on the merits. That denial was taken by interlocutory appeal to the Fifth Circuit Court of Appeals. The order denying injunctive relief was affirmed by the Court of Appeals in *Sharyland Water Supply Corp. vs. Block*, _____F.2d _____(5th Cir. 1985) (Appendix "A").

REASONS FOR GRANTING THE WRIT

This Petition presents an issue of substantial significance to loan applicants and borrowers who submit financial data to government lending or loan guarantee agencies in connection with loans and loan applications. Many thousands of persons throughout the United States at one time or another seek loans or loan guarantees from agencies of the Federal Government. Most are required to submit detailed financial data in connection with such loans and loan applications. Government lending and loan guarantee agencies are thus the repositories of vast quantities of sensitive and highly personal financial information revealing the income, expenditures, profits, and losses of many thousands of individuals, partnerships and corporations. At issue in the instant case is whether Congress, through the FOIA, intended to require these agencies to disclose such information to the general public whenever requested to do so.

Analysis of the problem begins with the Trade Secrets Act, 18 U.S.C. §1905, which clearly prohibits officers and employees of the United States from disclosing reports and records coming to them in the course of their employment showing the amounts and sources of income, profits, losses, and expenditures of corporations and associations. The disclosure of such information would not be in accordance with law and would constitute an abuse of agency discretion within the meaning of the Administrative Procedures Act, 5 U.S.C. §706(2)(A), if the information were found to be exempt from public disclosure under 5 U.S.C. §552(b)(4), *Chrysler Corp. v. Browne*, 441 U.S. 281, 318, 99 S.Ct. 1705, 1926, *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190, 1197 (4th Cir. 1976).

It has been held that the FOIA's fourth exemption includes information which is (1) commercial or financial; (2) obtained from a person; and (3) either (a) privileged *or* (b) confidential. *National Parks and Conservation Ass'n v. C. B. Morton*, 494 F.2d 765 (D. C. Cir. 1974). The Courts below have correctly noted that the first two such criteria for exemption are met here, and that a determination of Petitioner's entitlement to prevent disclosure thus depends upon whether or not the information sought is either privileged or confidential (Court of Appeals opinion, at p. 3102, A-5–A-7). The Court of Appeals determined that the information was not *confidential* because the Petitioner failed to prove that it would likely suffer a substantial competitive injury in the event of disclosure (Opinion at p. 3102, A-5–A-7). More significantly, the Court held that financial information given by a borrower to a government lender was not *privileged*. The issue which Petitioner wishes for this Court to examine is whether financial data submitted by a borrower to a government lending agency is privileged within the meaning of 5 U.S.C. §552(b)(4).

The term "privileged" is not defined within the text of 5 U.S.C. §552(b)(4). The Court of Appeals stated that "an absolutely literal interpretation" of such term would defeat *any* privilege, "for virtually every privilege is waived by disclosure to a third party". The Court nevertheless declined to look to the legislative history of the FOIA's fourth exemption for reasons explained and discussed, *post*. This Court *has* repeatedly looked to the legislative history of the various FOIA exemptions in order to more precisely define their parameters, *see Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340, 353, 99 S.Ct. 2800, 2808 (1979), *N.L.R.B. v. Sears, Roebuck, & Co.*, 421 U.S. 1504, 95 S.Ct. 1504 (1975), and has declined to do so only where such history did not contain compelling evidence of Congressional intent, *United States v. Weber Aircraft Corp.*, _____ U.S. _____ , 104 S.Ct. 1488, 1494 (1984). Petitioner would respectfully submit that the legislative history of the FOIA's fourth exemption *does* contain compelling evidence of Congressional intent to exempt from mandatory disclosure the precise information sought to be protected in the instant case. The Congressional committee reports on the Act's fourth exemption[1] clearly state that financial data submitted by an applicant or a borrower to a government lending or loan guarantee agency is privileged. Both the House and Senate Committees reporting out the Freedom of Information bill clearly stated that the term "privileged", as used in the Act's fourth exemption, was to include ". . . *financial data submitted by an applicant or a borrower to a lending agency in connection with any loan loan application or loan.* . . ." (S. Rep. 813, 89th Cong., 1st Sess. (1965)).

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1 S. Rep. No. 813, 89th Cong., 1st Sess. 1965; H. Rep. No. 1497, 89th Congress, 2d Sess. 1966, reprinted in 1966 U.S. Code Cong. & Ad. News 2418, at 2427.

and ". . . *financial data submitted by an applicant to a government lending or loan guarantee agency*" (H. Rep. 1497, 89th Cong., 2d Sess. (1966)).

The Court of Appeals nevertheless refused to accord any significance to the above-quoted segments of the relevant Committee reports. One basis cited for such refusal was the fact that same were carried forward from earlier Congressional reports on a prior draft of the Freedom of Information bill that included exemptions for *non*-commercial and *non*-financial information (Opinion at p. 3103, A-7–A-9). The Court concluded from the fact that the reports were carried forward unaltered, that the validity of those portions thereof dealing with financial information was also affected. In support of this conclusion, the Court cited the case of *Brockway v. Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975), wherein an attempt was made to use the Congressional commentary pertaining to *non*-commercial and *non*-financial information to re-extend the Act's fourth exemption to such information after same had been deleted from the text of the exemption. The Eighth Circuit Court of Appeals correctly held in that case that it should not "subordinate the unambiguous language of the statute to clearly contradictory legislative history". However, *Brockway* is clearly inapposite to the instant case. The use of superseded Congressional commentary dealing with non-financial information cannot be equated with the Petitioner's own reference to those segments of the Committee Reports which apply to the *retained* portions of the statute, particularly where the words of the Congressional committees so exactly describe the information being sought here. The Court of Appeals clearly erred in rejecting relevant portions of the Act's legislative history on the ground that other portions of that history had become irrelevant.

The compelling evidence of Congressional intent to shield the financial records of borrowers from mandatory disclosure is not offset by any countervailing evidence that Congress intended otherwise. Indeed, additional evidence of Congressional concern about the impact which the FOIA might have upon the financial privacy of borrowers is found in the legislative history of the eighth exemption. When evidence was presented regarding the purposes for such exemption (of certain reports prepared by, on behalf of, or for the use of agencies responsible for the regulation or supervision of financial institutions), members of the Senate Judiciary Committee's Subcommittee on Administrative Practice and Procedure stated that they considered the financial status of borrowers to be one of the most sensitive topics contained in the reports of bank examiners, and that they considered the shielding of such information from public disclosure one of the reasons for exempting examiners' reports from the FOIA's mandatory disclosure requirements. *See* Hearings on S. 1663 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong. 2d Sess. 186 (1964), at pp. 196-97. In testifying before such Subcommittee, the Chief Counsel for the Controller of the Public Currency stated that information concerning the financial status of borrowers was "the most sensitive area of information" contained in such reports. His statement was agreed with by the Committee Chairman, Senator Long, who further stated that "I agree with you that *that* information should not be made public, and *that* is what we think that Section 8 keeps from being made public. . .". (Emphasis Supplied). Thus, the intent of Congress to shield the financial records of borrowers from public scrutiny, which is manifested in the Committee reports on the Act's fourth exemption, cannot simply be attributed to an error. Rather, such reports contain clearly acticulated statements of *recurring* Congressional concern

that the FOIA not give rise to wholesale public scrutiny of the financial status and records of borrowers. The fact that Congress saw fit to specifically extend the privilege of non-disclosure to financial information submitted by persons borrowing or seeking to borrow from government lending and loan guarantee agencies merely emphasizes the fact that it saw such information as particularly sensitive and vulnerable to the potential abuses of mandatory disclosure.

The other ground upon which the Court of Appeals rejected the Committee reports was that no "lender-borrower" privilege pre-dated the FOIA, and that Congress did not therein create such a privilege (Opinion at pp. 3103, 3104).

Citing language used by Justice Douglas in refusing to stay a discovery order,[2] the Court of Appeals attributed to this Court the statement that the Freedom of Information Act "creates no privileges". The clear expressions of Congressional intent which are quoted above were thus disregarded by the Court of Appeals upon the ground that the exemption described therein did not pre-date the passage of the FOIA.

Petitioner respectfully disputes such analysis: First, Petitioner is unable to determine whether the distinction which the Court of Appeals drew between the creation of a new privilege and the recognition of an existing one was meant to constitute a holding that: (a) Congress did not *intend* to exempt information given to government lending and loan guarantee agencies, or that (b) despite its intent, Congress did not follow through in the *text* of the Act in

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2 *Chamber of Commerce of the United States v. Legal Aid Society of Alameda County*, 423 U.S. 1309, 96 S.Ct. 5 (1975).

exempting such information, or that (c) regardless of its intent, Congress was *powerless* to exempt such information.

If the Court of Appeals meant to hold that Congress did not *intend* to exempt such information, then Petitioner would respectfully submit that such holding is clearly contrary to the fourth exemption's legislative history. In reporting out the Freedom of Information bill, both the House and Senate Committees defined the privilege as including precisely the information sought to be protected in the instant case. For the reasons stated at pp. 8-10, *supra*, there is no reason to disregard such compelling evidence of Congressional intent.

If the Court of Appeals meant to hold that, despite the clear expressions of Congressional intent found in the Committee reports, Congress did not follow through in the *text* of the Act in exempting such information from disclosure, Petitioner is unable to find any basis for such a holding. First, the text of the Act does not contradict the legislative history in any manner. The term "privileged" is simply not defined therein. Second, Petitioner is unable to find any circumstance which may have intervened between the drafting of the Committee reports and the drafting of the text which might invite a questioning of the legislative history. Certainly, as has been discussed, *supra*, the fact that the Committee report language was carried forward from a prior draft of the FOIA has no bearing upon its application to those segments of the fourth exemption which were retained after amendment. Third, the fact that Congress did not state in the text of the Act that information given to government lending or loan guarantee agencies was privileged does not detract from the compelling evidence of Congressional intent found in the legislative history, since *no* specific information or privilege was set forth in

the text of the Act. This Court has repeatedly stated that a Court may look beyond the text of a statute to its legislative history where, as here, a literal reading of same fails to reveal its meaning or would lead to an unreasonable result and the legislative history provides compelling evidence of Congressional intent. In the instant case, the term "privileged" is not defined in the text of the FOIA's fourth exemption, but the exemption's legislative history clearly reveals that Congress intended to exempt information given to government lending and loan guarantee agencies in connection with loans and loan applications.

If the Court of Appeals meant to hold that Congress was *powerless* to exempt such information, Petitioner can find no basis for such a holding. This Court, in *United States v. Weber Aircraft Corp., supra*, clearly indicated that even a novel privilege would fall within the ambit of the Act's fifth exemption if provided for in the exemption's legislative history, (*Id.*, at pp. 1493, 1494). There is no reason to accord Congress less leeway in defining the parameters of the Act's fourth exemption.

As for Justice Douglas' statement that Congress created no new privilege in enacting the FOIA; to the extent that such statement is cited to support the proposition that Congress did not intend to exempt information given to government lending and loan guarantee agencies, Petitioner would respectfully submit that judicial interpretations of Congressional intent should be tested by reference to Congress' own expressions of that intent, not vice-versa. Moreover, such statement would seem to run contrary to language of this Court in *United States v. Weber* indicating that even a novel privilege set forth in the Act's legislative history will find judicial recognition. Petitioner would respectfully submit that the question of whether the exemption for information given to government lending and loan guarantee

agencies was "created" or "recognized" by Congress is academic, in light of Congress' clearly expressed intention that such exemption should exist.

If, however, it is important that Congress be deemed to have recognized, rather than created, the privilege, there is ample evidence that same existed and was recognized both in common and statutory law long before the FOIA's enactment. The State of Texas, for example, long prior to 1964, required banks to protect the confidentiality of their customers' financial records. Article 342-705 §§1-3, TEX. REV. CIV. STAT. ANN., first enacted in 1943, was enacted to shield bank customers from financial record disclosure except where the customer was a proper and necessary party to a pending court proceeding, and even then, notice and a hearing were to be afforded the customer before disclosure. The Texas statute, (attached hereto as Appendix "D"), is in keeping with the long-existing common-law right to financial privacy, which includes an implied legal duty on the part of the banks and other lending institutions not to disclose the financial affairs of their depositors and other customers. *Peterson v. Idaho First National Bank*, 367 P2d 284 (Idaho S.Ct. 1961); *United States v. First National Bank of Mobile*, 67 F.Supp. 616 (S.D. Ala. 1946); *Sparks v. Union Trust Company of Shelby*, 124 S.E.2d 365 (N.C. App. 1962); 10 Am. Jur. 2d *Banks*, §332.

Thus, had the Petitioner borrowed from a Texas bank, its financial records would be protected under Art. 342-705 §§1-3, TEX. REV. CIV. STAT. ANN., because the state district court presiding over the civil litigation pursuant to which the records are being sought denied the discovery request in accordance with the appropriate Texas discovery and evidence rules. In this connection, Petitioner would further show that this Honorable Court has repeatedly stated

that the purpose of the FOIA is not to benefit private litigants or to serve as a substitute for civil discovery, *Baldridge v. Shapiro*, 455 U.S. 345, 360, n. 14, 102 S.Ct. 1103, 1112, n. 14, *United States v. Weber, supra*, at 1494.

Finally, it is seen that the Court of Appeals took note of the fact that, under Texas law, the Petitioner must make its audit reports available to any of its 5200 members who may wish to see them. The Court clearly found such requirement to constitute some justification for its decision to hold that the records were not confidential under 5 U.S.C. 552(b)(4), but it did not discuss the effect of such availability upon the question of whether the records were privileged. Should this Honorable Court deem such member-access to affect the privilege issue, then Petitioner would respectfully submit the following:

While the State of Texas gives corporate shareholders (in the case of for-profit corporations) and contributing members (in the case of non-profit corporations), access to detailed corporate financial information,[3] it nevertheless continues to impose confidentiality upon the several state agencies and banks which might come into possession of it.[4] Unlike the Honorable Court of Appeals, the State clearly perceives no inconsistency in adhering to policy favoring the disclosure of information to persons with an interest in same, while simultaneously prohibiting state agency disclosure to the public at large. The State thus recognizes the

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3 Art. 1396 TEX. REV. CIV. STAT. ANN., §2.23B; BUS. CORP. ACT., Art. 2.44B

4 TEX. TAX CODE, §§171.206(2), 111.006, 151.027, 155.185, 154.308, and 22.27; Art. 342-705 §§1-3, TEX. REV. CIV. STAT. ANN.

right of corporate shareholders and members to both obtain the information for themselves *and* shield same from the general public. Parallels are found in federal legislation. The Internal Revenue Code, for example, at once permits the Internal Revenue Service to disclose the contents of tax returns to corporate shareholders owning 1% or more of the outstanding stock of a corporate taxpayer (26 U.S.C. §6103 (e)(D)(iii)), and prevents disclosure of same to the general public (26 U.S.C. §7213).

Long-standing public policy, as manifested in both state and federal legislation, thus draws a distinction between the information access rights of corporate shareholders/members and those of the general public. Shareholder and member access has long been mandated by law,[5] whereas disclosure to the general public has been generally prohibited. (Compare the afore-cited state statutes prohibiting disclosure, with the Trade Secrets Act, 18 U.S.C. 1905). Petitioner would respectfully submit that the reason that both the United States Congress and the Texas Legislature have failed to perceive any inconsistency in simultaneously mandating shareholder information-access and prohibiting the disclosure of same by state and federal agencies, is because there is no inconsistency to be perceived. The right to financial privacy may be possessed by a group of persons with a common interest in same, just as easily as it may be possessed by one individual.

The Court of Appeals' observation that Texas law requires Petitioner to make its audit reports available to its membership should thus have no bearing upon the issue of whether

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5 *cf. Guthrie v. Hardness*, 199 U.S. 148, 26 S.Ct. 4 (1905), which recognized the common-law right of shareholders to inspect the financial records of a corporation.

such reports, or the financial data contained therein, are privileged within the meaning of 5 U.S.C. §552(b)(4).

CONCLUSION

In conclusion, Petitioner would respectfully show that, when Congress enacted the FOIA, it clearly chose to shield information given to government lending and loan guarantee agencies from mandatory disclosure. No one reading the Committee reports can seriously argue otherwise. The words of the Act's authors are there for a reason. They should not have been disregarded by the Honorable Court of Appeals.

Upon the foregoing grounds, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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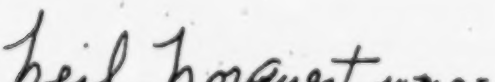
By 
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Attorneys for Petitioner/Appellant
Sharyland Water Supply Corp.

CERTIFICATE OF COUNSEL

I, NEIL NORQUEST, attorney for Sharyland Water Supply Corp., do hereby certify that the foregoing Writ of Certiorari of this cause is presented in good faith and not for purpose of delay.

Neil Norquest per m.a.s.
Neil Norquest

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been forwarded to the following:

Ms. Nancy K. Pecht
Assistant United States Attorney
P. O. Box 61129
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Mr. Joseph R. Preston
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Mission, Texas 78572

by depositing said copy in the U. S. Mails, postage prepaid, certified mail, return receipt requested on this 26th day of April, 1985.

Neil Norquest per m.a.s.
Neil Norquest

APPENDIX "A"

[3100] SHARYLAND WATER SUPPLY CORPORATION,
Plaintiff-Appellant,

v.

John R. BLOCK, Individually and as Secretary of U.S. Department of Agriculture, and J. Lynn Futch, Individually and as State Director of the Farmers Home Administration,
Defendants-Appellees,

and

Dieter Nippert and Wife,
Intervenors-Appellees.

No. 84-2536

United States Court of Appeals, Fifth Circuit.

March 18, 1985.

Nonprofit water supply company sought to enjoin the Farmers Home Administration from disclosing, in response to an inquiry under the Freedom of Information Act, audit reports which the company filed with the FHA pursuant to an application for a loan. The United States District Court for the Southern District of Texas, Filemon B. Vela, Jr., denied the application for preliminary injunction, and water supply company appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that audit reports which nonprofit water supply company was required by Texas law to disclose to its 5,200 members were neither confidential nor privileged and therefore were not exempt from

disclosure under Freedom of Information Act exemption protecting trade secrets and commercial or financial information obtained from a person and privileged or confidential.

Affirmed.

1. **Records key 50**

Freedom of Information Act is designed to promote disclosure of information and therefore the Act is to be construed with the view to disclosure, not secrecy, and exemptions from it are not to be read broadly. 5 U.S.C.A. §552.

2. **Records key 65**

One who seeks to prevent disclosure of material under Freedom of Information Act must prove that the material is within one of the Act's exemptions. 5 U.S.C.A. §552.

3. **Records key 59**

Information is "confidential" for purposes of Freedom of Information Act exemption protecting trade secrets and commercial or financial information obtained from a person and privileged or confidential only if its disclosure is likely to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the person from whom the information was obtained; to prove substantial competitive harm, parties seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. 5 U.S.C.A. §552(b)(4).

See publication Words and Phrases for other judicial constructions and definitions.

4. **Records key 59**

Audit reports which nonprofit water supply company was required by Texas law [3101] to disclose to its 5,200 members and which were filed with Farmers Home Administration pursuant to a loan application were neither confidential nor privileged and therefore were not exempt from disclosure under Freedom of Information Act exemption protecting trade secrets and commercial or financial information obtained from a person and privileged or confidential. 5 U.S.C.A. §552(b)(4).

5. **Records key 59**

For purposes of Freedom of Information Act exemption protecting trade secrets and commercial or financial information obtained from a person and privileged or confidential, word "privileged" refers only to privileges created by the Constitution, statute, or common law. 5 U.S.C.A. §552(b)(4).

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States District Court for the Southern District of Texas.

Before RUBIN and HILL, Circuit Judges, and CASSIBRY*, District Judge.

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* District Judge of the Eastern District of Louisiana, sitting by designation.

ALVIN B. RUBIN, Circuit Judge:

A non-profit water supply company sought to enjoin the Farmers Home Administration (FHA) from disclosing, in response to an inquiry under the Freedom of Information Act, audit reports the company had filed with the FHA pursuant to an application for a loan. The district court denied the application for a preliminary injunction, refusing to recognize a lender-borrower privilege under the Act. Finding no error of law in this conclusion and no abuse of discretion by the district court, we affirm.

Sharyland Water Supply Corporation (Sharyland) is defendant in a suit pending in Texas state court brought by Dieter Nippert and his wife, Heide Marie Nippert, in which the Nipperts seek damages for Sharyland's alleged failure to supply water to a mobile home park developed by the Nipperts. The state district judge denied the Nipperts' request to discover Sharyland's financial statements. Invoking the Freedom of Information Act (FOIA),[1] the Nipperts' counsel then requested the FHA to release audit reports that Sharyland had filed with the FHA to obtain a loan. The FHA agreed to release the reports. Sharyland then sued the FHA and the Secretary of Argiculture to block the release.

[1, 2] The FOIA is designed to promote the disclosure of information.[2] The Act is therefore to be construed with

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1. 5 U.S.C. §552.

2. *Department of Air Force v. Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11, 21 (1976); *Charles River Park "A", Inc. v. Department of Housing and Urban Development*, 519 F.2d 935, 941 (D.C.Cir. 1975); *Superior Oil Co. v. Fed. Energy Reg. Com'n.*, 563 F.2d 191, 204 (5th Cir. 1977).

a view to disclosure, not secrecy, and exemptions from it are not to be read broadly.[3] One who seeks to prevent disclosure of material must prove that the material is within one of the FOIA exemptions.[4]

[3102] Sharyland alleges that the audit reports are covered by the fourth exemption to the Act, which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[5] The audit reports are patently not trade secrets, but clearly are commercial or financial information obtained from a person. Hence, Sharyland must establish only that, in addition, they are privileged or confidential.[6]

[3] Information is "confidential" only if its disclosure "is likely . . . to impair the government's ability to obtain necessary information in the future . . . or to cause substantial harm to the competitive position of the person from whom the information was obtained."[7] To prove substantial competitive harm, the party seeking to prevent disclosure,

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3. *Department of the Air Force v. Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11, 21 (1976).

4. 5 U.S.C. §552(b); *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79, 93 S.Ct. 827, 832, 35 L.Ed.2d 119, 127 (1973); *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1197 (4th Cir. 1976), *cert. denied*, 431 U.S. 924, 97 S.Ct. 2199, 53 L.Ed.2d 239 (1977).

5. 5 U.S.C. §552(b)(4).

6. *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974).

7. *Id.* at 770; *Continental Oil Company v. Federal Power Commission*, 519 F.2d 31, 35 (5th Cir. 1975), *cert. denied*, 425 U.S. 971, 96 S.Ct. 2168, 48 L.Ed.2d 794 (1976).

must show by specific factual or evidentiary material,[8] not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure.[9]

[4] Sharyland is a rural water supply corporation. The corp ion is owned by its 5200 members, who receive wat rom it. Sharyland contends that it competes with both municipalities and subdivision developers who supply water to the subdivisions developed by them. It argues that disclosure of its financial statements would cause it irreparable harm in its relations with contractors, materialmen, suppliers, employees, and landowners.

The district court found that any competition Sharyland faces from other water suppliers is insignificant. It also found that contractors who bid to supply Sharyland with goods and services would not likely raise bids in response to any financial disclosure by Sharyland, and that knowledge of Sharyland's salaries obtained from financial statements would not increase the risk that other employers would try to bid away Sharyland's employees.

These findings must be accepted by us unless they are clearly erroneous.[10] We find nothing in the record to undermine confidence in them. We cannot fault the district

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8. *Pacific Architects & Engineers, Inc. v. Renegotiation Bd.*, 505 F.2d 383, 385 (D.C.Cir. 1974).

9. *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (D.C.Cir. 1976).

10. Fed.R.Civ.P. 52(a); *Kleppe, supra* note 9 at 679.

court for giving little weight to the Sharyland manager's speculative testimony concerning the harms Sharyland would suffer as a result of disclosure of the audit reports. Under Texas law, Sharyland must make the audit reports available to its 5200 members.[11] Texas law does not forbid disclosure by these members. We see no reason to hold erroneous a conclusion that what five thousand people may obtain without even a pledge of nondisclosure is not confidential.

Drawing on legislative history, Sharyland also argues that the information is privileged, not under another statute or the common law, but under a "lender-borrower" privilege implied in FOIA subsection (b)(4).

[3103] [5] The FHA urges that the word "privileged" in subsection (b)(4) embraces only material shielded by privileges recognized at common law or created by statute.[12] An absolutely literal interpretation would, however, defeat any privilege, for virtually every privilege is waived by dis-

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11. Tex.Rev.Civ.Stat.Ann. art. 1396-2.23(B).

12. *Compare* Fed.R.Evid. 501, which reads:
Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

closure to a third party.[13] To have any content, the statute must be read as referring to information that would have been privileged but for the requirement that it be revealed to the government.

As thus read, the term "privileged" refers only to privileges created by the Constitution,[14] statute,[15] or the common law.[16] None of these sources recognizes a lender-borrower privilege.

The Senate and House committed reports do explain that subsection (b)(4) covers "information customarily subject to the doctor-patient, lawyer-client, [or] lender-borrower privileges," as if the last were a recognized privilege.[17] But these specific passages were part of earlier congressional reports on a prior draft of the Freedom of Information bill that included an exemption for confidential non-commercial

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13. *See, e.g., Weil v. Investment/Indicators, Research and Management*, 647 F.2d 18 (9th Cir. 1981) (waiver of attorney-client privilege by disclosure of communications to third party); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C.Cir. 1981) (corporation waived attorney-client privilege by submitting documents to Securities Exchange Commission in connection with proposed exchange offer for shares); 8 *Wigmore, Evidence* §2327 (McNaughton rev. 1961).

14. *E.g.*, the fifth amendment.

15. *E.g.*, Tex.Rev.Civ.Stat.Ann. art. 3715a (Texas' clergyman-penitent privilege).

16. *E.g., Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960) (attorney-client privilege); *United States v. Cameron*, 556 F.2d 752 (5th Cir. 1977) (marital privileges).

17. S.Rep. No. 813, H.R.Rep. No. 1497, 89th Congress, *reprinted* in 1966 U.S. Code Cong. & Ad. News 2418, 2427.

and non-financial matters.[18] As noted in a district court decision, "[t]he words 'commercial or financial' were added to the 1964 bill (S. 1666, 88th Cong.2d Sess. 1964) which was reintroduced in 1965 as S. 1160. The congressional reports on S. 1160 simply adopted the Senate report on the 1964 bill (S. Rep. No. 1219, 88th Cong., 2d Sess. 1964) without altering the commentary to reflect the addition of 'commercial of financial.' "[19] The phrases relied on by Sharyland were carried forward in the committee reports after the proposed statutory language was changed.

Considering a similar issue, whether subsection (b)(4) protects noncommercial confidential information, the Court of Appeals for the Eighth Circuit, in *Brockway v. Department of Air Force,*[20] said, "we are not inclined to subordinate the unambiguous language of the statute to clearly contradictory legislative history. To hold otherwise would be to undermine the principle that enacted legislation should be generally [3104] considered the final and authoritative expression of the will of Congress on a matter."[21]

The Supreme Court stated in *Chamber of Commerce of the United States v. Legal Aid Society of Alameda County*

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18. *See Brockway v. Department of Air Force*, 518 F.2d 1184, 1189 (8th Cir. 1975).

19. *Consumers Union of U.S., Inc. v. Veterans Admin.*, 301 F.Supp. 796, 802 (S.D.N.Y. 1969).

20. 518 F.2d 1184 (8th Cir. 1975).

21. 518 F.2d at 1189. *See also Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed. 2d 766, 772 (1980); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973, 980 (1982).

that the Freedom of Information Act "creates no privileges. . . . neither does it diminish those existing."[22] We decline to hold that the Act creates a lender-borrower privilege.

Sharyland has, therefore, failed to show a substantial likelihood of success on the merits. We do not foreclose the possibility that it may adduce further evidence at trial but, from the record before us, we find no abuse of discretion in the district court's denial of injunctive relief.[23]

The order is, therefore, AFFIRMED.

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22. 423 U.S. 1309, 1310, 96 S.Ct. 5, 6, 46 L.Ed.2d 14, 15 (1975).

23. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed. 2d 648 (1975); *S-1 v. Turlington*, 635 F.2d 342, 345 (5th Cir. 1981).

APPENDIX "B"

No. C-2205-83-C

DIETER NIPPERT AND WIFE, MARIE NIPPERT,
d/b/a HEIDE'S HIDE-AWAY MOBILE PARK

VS.

SHARYLAND WATER SUPPLY CORPORATION

IN THE 139TH JUDICIAL DISTRICT COURT OF
HIDALGO COUNTY, TEXAS

ORDER

On the 2nd day of April, 1984, came on for hearing Plaintiffs' Objection to Defendant's Response to Request for Discovery. Through said objection, Plaintiffs sought to compel production of a list of about 1800 applicants for water service and copies of the Defendant's annual audit reports for the years 1979, 1980, 1981, 1982, and 1983. The parties appeared by and through their respective attorneys. The Court, having read Defendant's Response to Request for Production, read Plaintiffs' Objection to Defendant's Response for Production, examined the Court file, heard the evidence and argument of counsel, and is of the opinion that Plaintiffs' Objection to Defendant's Response to Request for Discovery should be overruled and Plaintiffs' Request for Production and Inspection should be denied.

Now, therefore, it is hereby ORDERED, ADJUDGED, and DECREED, that;

1. Plaintiffs' Objection to Defendant's Response to

Request for Discovery is overruled.

2. Plaintiffs' request that the Court order discovery of Defendant's audit reports is denied.

3. Plaintiffs' request that the Court order discovery of a list of those people who have paid a membership fee to Defendant but who are not currently receiving water as well as the addresses of such applicants who have paid their application fee but who are not receiving water currently.

It is further ORDERED that Plaintiffs refile pleadings pursuant to Defendant's special exceptions no later than April 21, 1984.

SIGNED this 5th day of April, 1984.

/s/ Raul L. Longoria
Judge Presiding

APPENDIX "C"

United States Department of Agriculture

Farmers Home Administration

101 South Main, Suite 102
Temple, Texas 76501

Mr. John R. Preston
Attorney at Law
P.O. Box 1198
1420 Conway
Mission, Texas 78572

April 24, 1984

Dear Mr. Preston:

This is in response to your request under the Freedom of Information Act for copies of audit reports of Sharyland Water Supply Corporation, for the years 1979, 1980, 1981, 1982 and 1983.

We have requested our Farmers Home Administration (FmHA) District Director at Rio Grande City to furnish this office with the audit reports you requested.

Upon receipt of the audits, a determination will be made regarding the fee for copying, and you will be advised of the cost at the time.

Sincerely,
J. LYNN FUTCH
State Director

CC:Sharyland Water Supply Corporation
District Director #17
Office of General Counsel

APPENDIX "D"

Section 1. No bank shall be required to recognize the claim of any third party to any deposit, or withhold payment of any deposit to the depositor or to his order, unless and until the bank is served with citation or other appropriate process issuing out of a court of competent jurisdiction in connection with a suit instituted by such third party for the purpose of recovering or establishing an interest in such deposit; neither shall any bank be required to disclose or produce to third parties, or permit third parties to examine the amount deposited by any depositor or records of accounts or other bank records except (i) where the depositor or owner of such deposit or other bank customer as to whom records of accounts or other bank records are to be disclosed is a proper or necessary party to a proceeding in a court of competent jurisdiction in which event the records pertaining to the deposits, accounts, or other bank transactions of such depositor, owner, or customer shall be subject to disclosure or (ii) where the bank itself is a proper or necessary party to a proceeding in a court of competent jurisdiction or (iii) in response to a subpoena issued by a legislative investigating committee of the Legislature of Texas, or (iv) in response to a request for examination of its records by the Attorney General of Texas pursuant to Article 1302-5.01 et seq. of the Texas Miscellaneous Corporation Laws Act.

Sec. 2. Unless ordered otherwise by a court of competent jurisdiction, before disclosure, production, or examination may be required under Section 1 of this article, the agency, body, or party issuing or obtaining the order, subpoena, or request for the disclosure, examination, or production of records of deposits or accounts and other bank records shall (1) give notice of such order, subpoena, or request to the depositor or bank customer by personally serving the

depositor or customer with a copy thereof or by mailing a copy thereof to the depositor or customer by certified mail, return receipt requested, at least 10 days preceding the date when compliance with the order, subpoena, or request is required, and (2) certify to the bank (at the time the order, subpoena, or request is served or delivered to the bank) that the depositor or bank customer has been served with or has been mailed a copy of the order, subpoena, or request as required herein. A bank shall be entitled to recover reasonable costs of reproduction which it incurs in complying with orders, subpoenas, and requests for the disclosure, examination, or production of records of deposits or accounts and other bank records. The bank may notify its customer or depositor (unless ordered otherwise by a court of competent jurisdiction) of its receipt of any subpoena, order, or request for production.

Sec. 3. Each customer or depositor to whom notice of an order, subpoena, or request for disclosure, examination, or production of records of deposits or accounts or other bank records may, prior to the date specified therein for disclosure, examination, or production, file in an appropriate district court of the State of Texas a motion to quash the order, subpoena, or request or for protective order and shall make personal service of such motion on the party, agency, or body issuing or obtaining such order, subpoena, or request and on the bank prior to the date for disclosure, examination or production. Any motion to quash or for protection shall be verified. Failure to file and serve such motion to quash or for protection shall constitute consent for all purposes to disclosure, production, or examination made pursuant to this article.